

April 23, 2007

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notification of Ex Parte Communication
WT Docket Nos. 96-86, WT Docket 06-150, and PS Docket No. 06-229

Dear Ms. Dortch:

This letter notifies the Commission of a permitted, oral ex parte communication of Wirefree Partners III, L.L.C. ("Wirefree") concerning the 700 MHz proceedings referenced above. On **April** 20, 2007, Shelley L. Spencer, President and a manager of Wirefree, met with Angela Giancarlo, Legal Advisor to Commissioner Robert M. McDowell, to discuss the impact of the FCC's designated entity ("DE") rules on small businesses' participation in the upcoming 700 MHz auction.

The parties discussed the impact of the rules on small business participation in the recently completed AWS auction, and the fact that small businesses won fewer licenses, when measured by value, than other FCC auctions. Wirefree discussed the DE rules' impact on its existing PCS business, and its ability to raise money to participate in the upcoming 700 MHz auction. Ms. Spencer also provided a copy of her testimony before the House Subcommittee on Telecommunications and the Internet of April 19, 2007.

Sincerely,



Janet Fitzpatrick Moran
Counsel to Wirefree Partners III, L.L.C.

cc: Angela Giancarlo

**Testimony of Shelley Spencer
President of Wirefree Partners, LLC
Before the
House Committee on Energy and Commerce
Subcommittee on Telecommunications and the Internet
On the
“Digital Future of the United States Part 111: The Future of Wireless”
April 19,2007**

Chairman Markey, Ranking Member Upton and Members of the Committee, my name is Shelley Spencer, and I am the President of Wirefree Partners. Wirefree Partners is a start up company that purchased 16 licenses to provide wireless services in the FCC’s last auction of PCS spectrum. We are currently developing our roll out plan to deploy a wireless network in 16 markets to serve the public and to lease half of the spectrum, spectrum which we are not using in our own network, to Sprint Nextel. Over the past 10 years, we have participated in multiple spectrum auctions as a small business and have successfully built and grown wireless companies that have created over 200 new jobs and have offered consumers additional choices in wireless services. I am honored to participate in this panel as the Subcommittee explores the Future of Wireless.

From my perspective, the future of wireless in the **U.S.** is strong and exciting. **As** we have witnessed over the past decade, wireless is increasingly the preferred means of communications by consumers of all ages, income levels and occupations. It is telling that when my middle school daughter in Maryland, who can identify each cell phone model by name, calls her grandmother in Ohio it is on her cell phone not a wired phone and she doesn’t wait until after 11:00 PM for the rates to go down, as I did growing up.

The wireless industry is at the forefront in bringing new innovative services to all consumers. Significantly, as we have seen in many industries, innovation and

competition often are driven by the entry of new and competitive entrants that are started by entrepreneurs. Accordingly, it is extremely critical that spectrum policy be structured to provide meaningful opportunities for small business to participate in the future of wireless.

Congress recognized that disseminating licenses by auction would have a direct impact on the diversity of licensees unless the auction rules include provisions to ensure that licenses were available not just to large companies but also to small businesses, businesses owned by women and minorities and rural telephone companies. As set forth in Section 309(j) of the Communications Act, the FCC is required to design auction rules that achieve the goal of “disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”¹ The Act also requires that the FCC design auction regulations to ensure that those same entities – small businesses, rural telephone companies, and businesses owned by members of minority groups and women -- “are given the opportunity to participate in the provision of spectrum-based services.”² The FCC has interpreted this law, which established the Designated Entity (or “DE”) program, to now include only small businesses and rural telephone companies.

As a small business owner and woman entrepreneur with over 12 years of experience in the wireless industry, I am pleased to share with you the realities faced today by new entrants seeking to be a part of the wireless revolution in the U.S. by acquiring licensed spectrum through auctions. Over the years, my partners and I have seen the FCC’s auction rules vary significantly, sometimes erratically, from significant,

¹ 47 U.S.C. §309(j)(3)(B).

² 47 U.S.C. §309(j)(4)(C)(ii).

ongoing regulation of small businesses and other designated entities, to less regulation and more control left to the individual businesses. Based on our experience in creating new wireless companies with licensed spectrum as the core asset, we have found that spectrum policies must adhere to three fundamental principles for small businesses to have a meaningful opportunity to be a part of the wireless future. Small businesses need:

- (1) a meaningful opportunity to participate and bid against large carriers in auctions through bidding credits or closed bidding;
- (2) less government regulation to give small businesses more flexibility to run their businesses in a competitive wireless market including the ability to enter into commercial transactions with other wireless industry participants; and
- (3) regulatory certainty, stability and sufficient notice of auction and service rules so small businesses can raise the capital necessary to fund their auction participation and build their businesses.

I. OUR STORY – DISCIPLINED BIDDING AND ACCESS TO CAPITAL ARE KEYS TO SMALL BUSINESS SUCCESS IN THE WIRELESS INDUSTRY

My partners and I have **30** years of experience in serving the public and a track record of success in building and operating wireless networks from the early days of paging to cellular to PCS. Drawing on our team's extensive experience and ability to compete, we have been able to raise capital from leading venture capital firms, such as Globespan Capital of Boston, as well as secure debt to fund our spectrum acquisition and network costs. While it has never been easy for us to raise money, win at FCC auctions, or build a company from the ground up, as experienced entrepreneurs we continued to believe in and pursue the exciting opportunities to provide wireless services.

Throughout our ten year history in planning for and participating in spectrum auctions, we have faced different financial markets and competitive wireless markets. Without fail, however, we have always followed a disciplined business approach in

bidding on spectrum. At times, this disciplined approach has required us to withdraw from auctions without winning a single license. In the first, large PCS auction in 1996 where spectrum was reserved for bidding only by small businesses, we withdrew our \$20 million deposit and left the auction because the spectrum prices exceeded those in our business plan. In subsequent auctions when we acquired licenses, we honored in full our high bids and license payment obligations to the FCC. In the late 1990s, we built a company that developed and managed a PCS network in certain markets in the Southeast covering more than seven million people in three states and creating more than 200 jobs. Although the service was branded as Sprint through an affiliation agreement, that service was constructed and operated using its own equity and debt. Our ability to tap the public debt and equity markets for that company created a market standard that allowed similar, small companies to complete financings to build and operate their own wireless network, thereby generating new employment and economic growth. In 2005, because of our successful business history, our current company, Wirefree Partners, was able to raise its own equity and debt financing to fund the purchase of 16 PCS licenses for total net winning bids of \$150 million and to cover our network construction costs. As a qualified small business, we were eligible for a 25 percent credit under the DE program, which was also crucial for our being competitive in that auction. We are currently deploying our own network with half of the spectrum while leasing the other half to Sprint Nextel.

11. SMALL BUSINESSES ARE A KEY COMPONENT OF THE U.S. ECONOMY AND SHOULD FULLY PARTICIPATE IN COMMERCIAL SPECTRUM OWNERSHIP

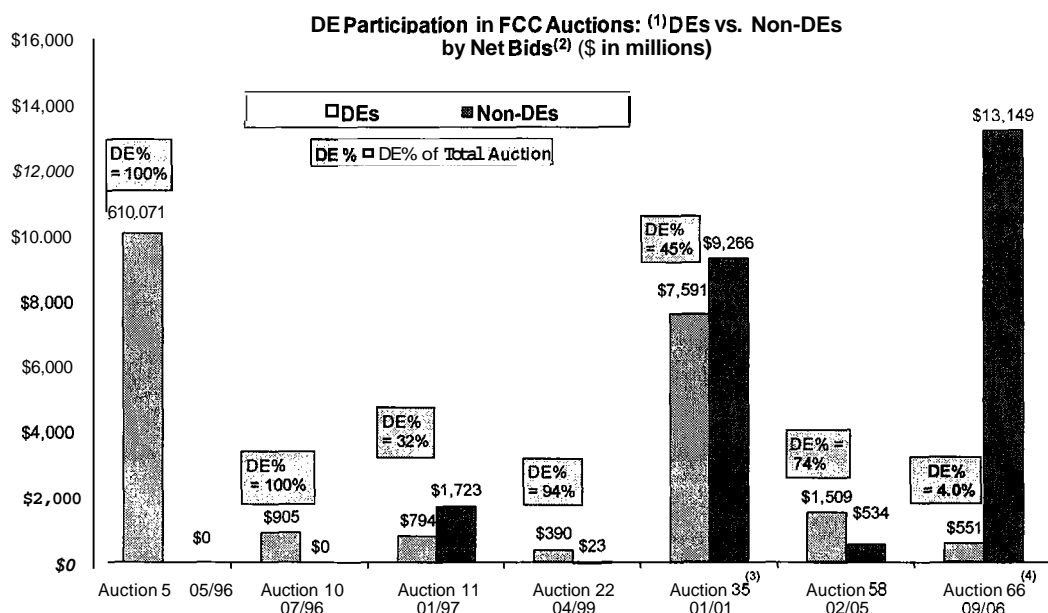
Small businesses are a vital part of the U.S. economy and should be given a meaningful opportunity to participate in the wireless industry by acquiring licensed,

commercial spectrum. According to the Small Business Administration (“SBA”), small businesses generated 60 to 80% of the new jobs in the U.S. annually during the last decade. More than 45% of the private payroll in the U.S. is by small business employers. In addition, small businesses are leaders in innovation. SBA reports that small businesses receive 13 to 14 times more patents per employee than large patenting firms.³ Women business owners, like me, are an important part of that small business growth. The last Census found that in 2002, women owned 6.5 million businesses in the U.S. and that these women-owned firms generated over \$940 billion in revenues while employing 7.1 million workers.

This stellar contribution of small businesses and women entrepreneurs as an engine for economic growth has not been replicated in the acquisition of FCC licenses. In the last major spectrum auction held last year by the FCC for 90 MHz of Advanced Wireless Services (“AWS”) spectrum, entities that qualified as small businesses won less than 4% of the licenses measured by economic value. This stands in stark contrast to the historical 74% average of licenses by value won by small business in PCS auctions where small businesses were afforded bidding credits and, at times, were part of a closed bidding process.

³ See **Frequently Asked Questions**, www.sba.gov/advo/.

Exhibit from Council Tree Communications, Inc. et al. v. FCC No. 06-2943:



⁽¹⁾ Auctions 5 and 10 included only Closed Licenses (i.e., for DEs only). Auctions 11, 22, 35 and 58 included both Closed and Open Licenses (with Open Licenses available both to DEs and non-DEs and with DEs receiving bidding credits). Auction 66 was the only one of these to include Open Licenses only.

⁽²⁾ Net Bid is the gross bid less any DE bidding credits.

⁽³⁾ Auction 35 results overturned by Supreme Court ruling in the NextWave case.

⁽⁴⁾ Winning bids as of close of Auction 66.

This mixed track record in auctions from 1996 to 2006 calls for an evaluation of past, present, and future spectrum policy, and specifically auction policy, to determine how small businesses can be meaningful participants in the future of the wireless industry.

11. ACQUIRING SPECTRUM AND RUNNING A WIRELESS BUSINESS REQUIRES SIGNIFICANT CAPITAL, MAKING BIDDING CREDITS AND CLOSED BIDDING ESSENTIAL TO SMALL BUSINESSES

The wireless business is a capital-intensive business and requires bidders to raise significant capital in advance of the auction just to acquire spectrum. This is a particular challenge for small businesses. In the AWS auction, held by the FCC last year, bidders

seeking to bid on one license in the six licenses regional economic areas were required to deposit between \$15 and \$50 million prior to the auction start and just to place one bid. The licenses in that auction went for an average of 54¢/MHz Pop and netted winning bids in excess of \$13 billion which was deposited directly into the U.S. Treasury. Licenses for urban areas received multimillion dollar winning bids. For example, the high bid for a 10 MHz license in the Boston area was \$30.4 million, the winning bid for this license in Pittsburg was \$14.8 million, \$9.3 million for Grand Rapids and \$50 million for the Detroit market. None of these licenses were won by bidders that qualified as a small business.

Beyond acquiring spectrum, a new wireless company must also fund its network expenses and operating costs, making the full budget for even small wireless carriers in the hundreds of millions of dollars over and above the license cost. In our network build-out, we are experiencing per cell site build costs in the range of \$85,000 to \$150,000 per site. These hardware costs do not include any costs for operating expenses, marketing or administrative costs. Accordingly, new wireless carriers must raise significant capital even before they provide service to a single customer and with a lead time of 12 to 18 months, which only adds to the overall expense.

The prospect of acquiring spectrum is particularly daunting for a small business or new entrant if it is forced to bid against large entities for the same spectrum or without a bidding discount. Not surprisingly, the most successful auctions for small businesses have been those in which a portion of the spectrum was reserved for bidding by small businesses and small businesses were provided bidding discounts.⁴ While there were

⁴ Under the Designated Entity program, qualified small businesses and rural telephone companies are eligible for bidding credits of 15 or 25 percent, depending on the size of the entity.

some high profile defaults by bidders in past auctions reserved for small business, most notably the auction for PCS spectrum in 1996, these are not the only stories that should be heard. Other small businesses have acquired spectrum in auctions, paid for their licenses and run successful businesses. Competitive providers Tritel and Telecorp both acquired spectrum and deployed new networks using spectrum from spectrum auctions in the late 1990s. The now successful competitive providers, Metro PCS and Leap Wireless, that compete against the national wireless carriers each hold spectrum awarded to them when they qualified as small businesses. By contrast, the recent **AWS** auction did not result in any small business bidders acquiring any meaningful spectrum in major markets. Accordingly, one way to lower the entry barrier to spectrum acquisition for small business is to provide for closed bidding by small businesses only for certain spectrum and to retain the use of bidding credits for DEs.

IV. LESS IS MORE IN GOVERNMENT REGULATION OF SMALL BUSINESSES SEEKING TO COMPETE IN THE COMPETITIVE WIRELESS MARKETPLACE

Based on our experience, a small business' qualifications for spectrum licensing should be measured by ownership and control requirements. Once these "bona fides" are established, less government regulation will provide small business with the ability to compete fully in the wireless industry. Streamlined regulation is also consistent with the Congressional directive in Section 257 of the Communications Act, directing the FCC to periodically review its rules and report to Congress on any regulations prescribed to eliminate market entry barriers for entrepreneurs and small businesses.⁵ There is no single formula for small business success and small providers must be allowed to enter

⁵ 47 U.S.C. §257(c).

into strategic commercial transactions with other companies to raise the money necessary to participate in the auctions and succeed in the competitive wireless marketplace.

Over the past ten years, the spectrum auctions have included a myriad of different rules for qualifying and maintaining a wireless company's status as a small business. Auction rules can either restrict or enable a small business' ability to raise the necessary capital to run a wireless company and affect its ability to compete in the very competitive wireless industry. Since the inception of spectrum auctions, we have seen the pendulum swing from significant regulation of our small business structure and operations to less regulation and back to more regulation. Consistently, we have found that for our entrepreneurial companies to raise the capital necessary to be in the wireless business, we must be able to adjust our business plan and operations quickly to react to the dynamic and changing market conditions and respond to technological innovation. If we must seek government approval of each business initiative, we just can't compete.

My company is a good case study. We were only able to fund our net winning bids for **16 PCS** licenses in Auction **58** of **\$150** million, and our initial build-out efforts, by leasing **50%** of our spectrum to subsidiaries of Sprint Nextel. The lease is on commercially reasonable terms and does not provide Sprint Nextel with any management or ownership rights in Wirefree Partners, a true arms length transaction. We paid for the spectrum with our own debt and equity capital. With the funding raised, we are now focused on deploying our own network in each of the **16** licensed markets. Without the ability to supplement our projected business plan with leasing revenues, Wirefree Partners would not have been able to raise sufficient capital to participate in Auction **58** or fund its preliminary network build-out and ongoing operations.

It is important that any policies designed to promote participation by small businesses in spectrum auctions in the future actually flow to those small businesses. We therefore applaud FCC efforts to ensure that ownership and control truly rest with the small business entrepreneurs. However, regulation beyond the traditional test of ownership and control stifle small business participation in spectrum auctions and in developing service offerings dependent on commercial relationships with others in the wireless industry. This flexibility is critical in the wireless industry where technology and innovation are a daily occurrence that should be encouraged and promoted. Excessive government regulation will chill the innovation, investment and the roll out of services to meet public needs. Significantly, my company's lease of half of its spectrum to raise money, to buy spectrum and to start our business is now impermissible under the current rules for future auctions. Government regulation should not impinge on strategic business decisions or stifle the kind of innovative service offerings and necessary financing arrangements of small businesses.

V. REGULATORY CERTAINTY AND STABILITY ARE CRITICAL FOR SMALL BUSINESSES TO RAISE CAPITAL AND FULLY PARTICIPATE IN THE WIRELESS INDUSTRY

Regulatory certainty is critical to any bidder's participation in a spectrum auction and especially essential to small businesses that often do not yet have significant revenues or cash flow to fund spectrum acquisition. Start up companies and small businesses often need months to secure the funding necessary for a spectrum auction. We typically have to begin the process of raising capital eight to twelve months before an auction starts or payments are due. The impact of regulatory uncertainty or adequate notice of the rules for the auction is particularly essential in the licensed wireless industry

where new entrants face stiff competition from national carriers. In addition, investors are often critical of the prospects for success of new, smaller entrants in this highly competitive market. Thus, investors and prospective lenders routinely require entrepreneurs to present business plans with sound fundamentals, strategic advantages and limited regulatory risk.

Congress had the foresight to recognize the need to provide adequate advance notice of auction rules in granting the FCC auction authority. The statute expressly requires that adequate notice be given to bidders to enable them to develop business plans and raise capital. The key section, **47 U.S.C. §309(j)(3)(E)**, in part, requires that the FCC:

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed—

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.⁶

Accordingly, adequate notice of final auction rules well in advance of the auction are a key component of providing small businesses with a meaningful opportunity to participate in the acquisition of spectrum.

I greatly appreciate the opportunity to appear before the Subcommittee on this important topic and look forward to your continued interest in promoting small business participation in the wireless industry and in spectrum licensing. I would be happy to answer any questions you may have.

⁶ **47 U.S.C. §309(j)(3)(E)**.